

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 302 of)
the Telecommunications Act of 1996)
)
Open Video Systems)

CS Docket No. 96-46

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REPLY COMMENTS OF ACCESS 2000

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COMMENTS OF ACCESS 2000

Access 2000¹ submits the following Reply Comments in response to the Notice of Proposed Rulemaking (hereafter Notice) in the above titled proceeding.

I. OVS COULD END UP ON THE REGULATORY JUNK PILE WITH VDT

In our Comments, Access 2000 urged the FCC to implement Section 302 of the Telecommunications Act of 1996 (the Act) with minimum regulatory requirements and maximum flexibility to encourage telephone companies to choose the open video system model for their video programming services.

OVS was designed by Congress to be an alternative to both the common carrier model and the closed cable model. Congress did not, however, intend that OVS regulation would be an amalgam of common carrier and cable regulation. In fact, just the opposite is true.

"New section 653(c) sets forth the reduced regulatory burdens imposed on open video systems. There are several reasons for streamlining the regulatory obligations of such systems. First, the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open systems will be "new" entrants in established markets and deserve lighter regulatory burdens to level the playing

¹ Access 2000 is a membership organization of independent film, television, video and new media producers whose mission is to maximize access to new media and technology-based markets for its members' products. Access 2000 aims to promote its membership's interests by articulating members' needs and concerns to regulatory bodies, distributors, investors and the public.

field. Third, the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced.² (emphasis added)

Notwithstanding this general admonition, the Act does establish a regulatory framework for OVS. The Comments filed in this proceeding push and pull the Commission in different directions on each of the issues discussed in the Notice of Proposed Rulemaking. Access 2000 urges the Commission to measure its decisions against Congress's admonition to streamline regulatory obligations for OVS providers. If not, OVS could end up on the regulatory junk pile with video dialtone.³

II. OVS PROVIDERS SHOULD HAVE SIGNIFICANTLY FLEXIBILITY IN SETTING RATES FOR DIFFERENT CATEGORIES OF VIDEO PROGRAMMERS

In our Comments, Access 2000 argued that allowing OVS operators to charge different rates for different categories of programming is permissible and in the public interest. We believe that within each of these categories the Commission should require that rates for carriage be "just and reasonable and ... not unjustly or unreasonably discriminatory," but that between categories, the OVS operator should have a fair degree of latitude.

² Telecommunications Act of 1996, Conference Report, at 62.

³ In fact, in many areas OVS may already be a non-option. Ameritech has just been awarded its fourteenth franchise to provide cable television service in its region demonstrating that the closed cable model is an attractive option for local exchange carriers.

Comments filed by MFS are consistent with our position.⁴ Comments filed by others,⁵ however, ask the Commission to impose common carrier-like regulations on OVS rates and should be rejected. The Motion Picture Association of America (MPAA) urges the Commission to adopt rules, "that would prohibit any kind of discrimination based on content or that otherwise is not economically justified."⁶ It is unclear what MPAA means by "economically justified." However, MPAA opposes the Commission's proposal to adopt a presumption that rates are reasonable if some number of non-telco programmers gain access to the OVS network or if rates for non-telco programmers are the same as for the telco-affiliated programmer. Further, MPAA urges the Commission to adopt a cost based formula for rates and strict cost allocation requirements. We can only presume then that the phrase "economically justified" refers solely to OVS network based costs.

Access 2000 believes that in order to ensure that OVS subscribers have access to the widest variety of programming from the widest variety of sources, OVS operators should have significant flexibility in establishing rates for different categories of programmers. One way to achieve this goal is to allow OVS operators to develop prospective payment models.

⁴ See Comments of MFS at 8-14.

⁵ See, for example, Comments of the National Cable Television Association and the National League of Cities.

⁶ Comments of MPAA at 9.

III. OVS OPERATORS SHOULD BE ALLOWED TO DEVELOP PROSPECTIVE PAYMENT MODELS

Notwithstanding the fact the OVS was adopted by Congress as an alternative to the common carrier and closed cable models, very few of the Comments received by the Commission demonstrate thinking beyond these two approaches. For example, in our Comments Access 2000 argued that OVS operators should be allowed to develop prospective payment models and apply those models to categories of video programmers. Payment could be based upon the number of subscribers, or set as a fixed percentage of a video programmer's revenues. OVS operators and their affiliates should also be allowed to develop other business and financial models to develop or license programming that would be distributed over the OVS network. Such arrangements could include underwriting production costs and eliminating the need for an up-front payment or entry fee into the OVS network.

CONCLUSION

Congress adopted an OVS model to provide a significant degree of regulatory flexibility for telephone companies entering the video programming market. The Commission can best achieve this goal by providing for maximum business flexibility, minimum regulation, and appropriate oversight and review.

Respectfully submitted,



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